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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD S. BELKNAP,

Defendant and Appellant.

A155022

(City & County of San Francisco  
Super. Ct. No. 15008215)

Defendant Donald S. Belknap appeals a judgment convicting him of assault with a deadly weapon and sentencing him to nine years in prison, based on a four-year term for the assault and a consecutive five-year enhancement for a prior serious felony conviction. He contends there is no substantial evidence to support the jury's findings that he was not acting in self-defense when he struck the victim's head with a glass bottle or that the bottle qualified as a deadly weapon. Alternatively, he contends the case must be remanded to allow the trial court to exercise its sentencing discretion to strike the five-year enhancement pursuant to Senate Bill No. 1393 (Stats. 2018 (2017-2018 Reg. Sess.) ch. 1013, §§ 1-2). We agree only that the limited remand is appropriate. Accordingly, we shall vacate the sentence and remand for resentencing, but affirm the judgment in all other respects.

**Background**

Defendant was charged with a single count of assault with a deadly weapon (Pen. Code,<sup>1</sup> § 245, subd.(a)(1)). The information also alleged an enhancement for infliction of

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise noted.

great bodily injury (§ 12022.7, subd. (a)), as well as enhancements based on a prior felony conviction (§§ 667, subds. (a)(1), (d), (e), 667.5, subd. (b), 1170.12, subds. (b), (c).)

At trial, evidence was presented that defendant struck the victim on the back of his head with an empty glass bottle as the victim was leaning over to roll up his pants. The wound on the victim's head bled and required staples to close the wound but his injuries were not life threatening.

Defendant did not dispute hitting the victim, but claimed he was acting in self-defense. He testified that at about an hour before the assault he was beaten and stabbed by three men he described as "Mexicans" and who he believed were affiliated with a gang. The men robbed him of his phone, money, and cigarettes. Later, when he saw the victim on the street, he mistook him for one of his attackers. He did not see the victim's face but believed that he was "Mexican" and thought that when he bent down to roll up his pants that he was reaching in his shoe for a knife. Defendant hit the victim over his head with the bottle while he was bent over.

After the assault, defendant crossed the street and waited for the police to arrive. One of the officers who arrested defendant confirmed that he had seen defendant about 40 minutes earlier and one block away. Defendant had caught his attention because "[h]e had blood on his face, and it looked like maybe he had been assaulted." At that time, the officer called out to defendant asking if he was okay, but defendant just grunted and continued walking.

At the time of his arrest, defendant told the officers that he had been assaulted. He did not admit to hitting the victim but repeated "I was defending myself." Defendant was transported to the hospital where he was treated for several stab wounds and a possible concussion.

The jury found defendant guilty of assault with a deadly weapon but found the great bodily injury allegation not true. Thereafter, the court found the prior conviction allegation true. After denying defendant's motions to strike his prior strike conviction and to reduce the charge to a misdemeanor under section 17, subdivision (b), the court

sentenced defendant to a total of nine years. The court imposed the low term of two years for the assault, doubled because of his prior strike conviction, and a consecutive five-year term for his prior serious felony conviction.

Defendant's notice of appeal was deemed timely filed.

### **Discussion**

1. *The notice of appeal was deemed timely by this court under the constructive filing doctrine.*

Defendant was sentenced on September 22, 2017. As required by California Rules of Court, rule 4.305, the court personally advised defendant, with his attorney present, of the timeline to exercise his right of appeal and defendant acknowledged that he understood those rights. On August 1, 2018, defendant filed an untimely notice of appeal and, on August 13, 2018, defendant filed a motion for constructive filing of the notice of appeal. Defendant's motion was supported by a declaration from defendant's trial attorney who claimed that she failed to timely file the notice of appeal because this was her first felony trial and she was unaware that she had a duty to do so.<sup>2</sup> In addition, she claimed that defendant suffered mental health issues from a "traumatic brain injury" that presumably would interfere with his ability to navigate the appeals process alone. This court issued an order granting defendant's motion to deem the notice of appeal timely filed without prejudice to further consideration of timeliness when considering the merits of the appeal. Although we erroneously noted that "no opposition was filed" when in fact

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<sup>2</sup> Section 1240.1, subdivision (b) provides: "It shall be the duty of every attorney representing an indigent defendant in any criminal, juvenile court, or civil commitment case to execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders to be appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue any relief that may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal." (See also *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 477 [Trial counsel has a professional duty to ensure appellant's notice of appeal is timely filed.] )

timely opposition and reply briefs had been filed, that was not the basis of the ruling. The ruling, in effect, was to defer any ruling until issuance of this opinion.<sup>3</sup>

The People now reassert the argument that defense counsel's declaration was insufficient to show constructive filing absent a showing of diligence on the part of defendant. Defendant contends his trial attorney's declaration amply supports the court's prior order permitting constructive filing based on her ineffective assistance and that there is no basis to reconsider that ruling. Alternatively, he asserts that if this court were to reverse its ruling, he "would petition for writ of habeas corpus based on the same facts" because "counsel's deficient representation violated his fundamental Sixth Amendment rights to effective assistance of counsel." When counsel's constitutionally deficient performance deprives a defendant of an appeal he otherwise would have taken, a successful ineffective assistance of counsel claim has been made, entitling the defendant to an appeal. (*Roe v. Flores-Ortega*, *supra*, 528 U.S. at p. 483; see also *People v. Byron* (2009) 170 Cal.App.4th 657, 666-667 [untimely appeal treated as petition for writ of habeas corpus in interests of judicial economy due to possible viable ineffective assistance of counsel claim].) Given counsel's acknowledged violation of section 1240.1, subd. (b), we reaffirm our prior order deeming the notice of appeal timely filed.

2. *Substantial evidence supports the jury's finding that the bottle was a deadly weapon.*

"As used in section 245, subdivision (a)(1), a 'deadly weapon' is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' " (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) Certain weapons, such as dirks and blackjacks, are considered inherently deadly as their ordinary use is as an instrument designed to produce death or great bodily injury. (*Id.* at p. 1029.) Where the weapon used is not deadly per se, the trier of fact must determine whether its use was under circumstances likely to produce death or great bodily injury, taking into account "the nature of the object, the manner in which

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<sup>3</sup> The People's request for judicial notice of this court's docket is denied as unnecessary.

it is used, and all other facts relevant to the issue.” (*Ibid.*; see also *People v. Aledamat* (Aug. 26, 2019, S248105) \_\_ Cal.5th \_\_ [2019 D.A.R. 8138, 8140, 8143]; *People v. Baugh* (2018) 20 Cal.App.5th 438, 445.) In *In re B.M.* (2018) 6 Cal.5th 528, 530, the court confirmed that “for an object to qualify as a deadly weapon based on how it was used, the defendant must have used the object in a manner not only capable of producing but also *likely to produce* death or great bodily injury.”

The jury was correctly instructed on the definitions of deadly weapon and great bodily injury. On appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence to support the jury’s verdict. (*People v. Chatman* (2006) 38 Cal.4th 344, 389.)

Defendant concedes that a bottle when used as a “club or missile” has been held to be a deadly weapon. (*People v. Cordero* (1949) 92 Cal.App.2d 196, 199 [defendant hit victim with a beer bottle which “knocked him down”]; see *People v. Martinez* (1977) 75 Cal.App.3d 859, 862, 864 [beer bottle thrown at police car shattered officer’s elbow].) He argues, however, that the manner in which he used the bottle to defend himself in this case was not *likely* to cause serious bodily injuries or death because he did not break the bottle before hitting the victim and only struck the victim once with the empty 12 ounce. bottle. He notes that the bottle did not break or chip on impact, he maintained control of the bottle after striking the victim, and that no evidence was presented to show that a blow with an intact, empty bottle was likely to cause serious bodily injury. We disagree.

Defendant hit the unsuspecting victim on his head while the victim was bent over and defenseless. Although the jury rejected the great bodily injury enhancement, the evidence showed that the injury was severe enough to require staples to close the wound. Unlike in *B.M.*, where the court found that defendant’s use of a butter knife did not meet the criteria of a deadly weapon when it was pointed at the victim’s legs, the manner in which defendant used the bottle in this case amply supports the jury’s finding that it was both “capable of producing but also *likely to produce* . . . great bodily injury.” (*In re B.M.*, *supra*, 6 Cal.5th at p. 530.)

3. *Substantial evidence supports the jury's finding that defendant was not acting in self-defense when he assaulted the victim.*

The jury was properly instructed on the theory of self- defense pursuant to CALCRIM No. 3470, in relevant part as follows: “The defendant is not guilty of those crimes if he used force against the other person in lawful self-defense. The defendant acted in lawful self-defense if: [¶] 1. The defendant reasonably believed that he was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully; [¶] 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of bodily injury to himself or an imminent danger that he would be touched unlawfully. Defendant’s belief must have been reasonable and he must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful self-defense.”

Defendant contends “no reasonable jury could have found that the prosecution met its burden of proving beyond a reasonable doubt that appellant did not act in self-defense” because self-defense was “the only reasonable explanation for his behavior.” He argues his defense at trial “appropriately rested on the reasonableness of [his] actions, even in the face of his mistake, given all that had happened to him that night.” Even assuming, however, that the jury credited defendant’s testimony of the prior assault and the misidentification of the victim, the jury could still have rejected his claim of self defense based on the absence of any evidence justifying the assault. Defendant testified that he saw the victim from a distance and continued walking towards him. Defendant “approached” the victim from the victim’s side and hit him as he was “crouched down digging in his sock.” Although defendant also testified that he had seen some men running in an alley and believed they were “coming up behind” him, there was no

evidence of imminent danger posed by the victim or that the use of force was necessary to dispel such danger. Substantial evidence supports defendant's conviction for assault with a deadly weapon.

4. *A limited remand is appropriate.*

Under the law in effect at the time of defendant's sentencing, trial courts had no authority to strike a prior serious felony conviction in connection with the imposition of a five-year enhancement under section 667, subdivision (a)(1). (Former § 1385, subd. (b), Stats. 2014, ch. 137, § 1; *People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045-1047.) Effective January 1, 2019, Senate Bill No. 1393 amended section 1385, subdivision (b) and section 667, subdivision (a) to provide such authority. (Stats. 2018, ch. 1013, §§ 1-2.) The parties agree that the amendments apply retroactively to cases such as this that are not yet final. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) The People also agree that because the trial court did not indicate at the time of sentencing whether it would have imposed the same sentence had it had the discretionary authority to do so, remand is warranted. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [Remand is required unless "the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the previously mandatory] enhancement."].) Indeed, in this case the court specifically noted when imposing the enhancement that the consecutive five years was mandatory. Accordingly, remand is appropriate to allow the trial court to exercise its discretion to determine whether to strike defendant's prior serious felony conviction.

**Disposition**

The matter is remanded to the trial court with directions to consider whether to exercise its discretion to strike defendant's five-year prior serious felony enhancement, and, if appropriate following exercise of that discretion, to resentence defendant accordingly and provide a corrected abstract of judgment to the appropriate agencies. The judgment is otherwise affirmed.

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POLLAK, P. J.

WE CONCUR:

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STREETER, J.

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TUCHER, J.

A155022